No. 2937.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC COAST PIPE COMPANY, a Corporation,

Appellant,

vs.

CONRAD CITY WATER COMPANY, a Corporation, PONDERA VALLEY STATE BANK, a Corporation, CONRAD BANKING COMPANY, a Corporation, CONRAD TRUST & SAVINGS BANK, a Corporation, CONRAD MERCANTILE COMPANY, a Corporation, JAMES T. STANFORD, Receiver, and PARIS B. BARTLEY, Trustee,

Appellees.

BRIEF FOR APPELLEES

O. W. McCONNELL,
J. A. McDONOUGH,
Attorneys for Appellees.

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BRIEF FOR APPELLEES

THE FACTS IN THIS CASE ARE BRIEFLY THESE:—

BEN HAGER, obtained a franchise from the Town of Conrad, to construct a water supply system and sub-

sequently obtained a right of way for pipe lines, reservoir sites and springs for the water supply. Being a man of somewhat limited means, he had to apply to others for money with which to carry out the project.

To save confusion it may be stated that he carried on the business under the name of Conrad City Water Company, but no corporation was organized of that name until long after the plant was completed. Mr. Hager was then in the position of being the owner of the water plant and franchise, together with its office building in Conrad and after the Conrad City Water Company was legally incorporated, Mr. Hager made a proposition to transfer to it, his water works system in consideration of 99,980 shares of the capital stock of the Company, $70,000.00 evidenced by a promissory note to be secured by $80,000.00 par value Gold Bonds, the payment of which Bonds was to be secured by a first mortgage lien upon the property of the Company. By resolution of the stockholders, duly passed at a regularly called stockholders' meeting, it was resolved that the offer be accepted and that the Company deliver to Hager 99,980 shares of the capital stock of the Company, its note for $70,000.00 and as security for the payment of said note or notes to have its bonds secured by mortgage on the property of the Company to the amount of $80,000.00. (See Tr. pp. 50, 51 and 52).

Thereupon the said Ben Hager conveyed all the property and franchise to the Corporation, together with the office building in the Town of Conrad and the site thereof. It appears that instead of giving the

note directly to Ben Hager, the notes were executed and delivered directly to the persons and corporations who had provided Ben Hager with means and money to construct the water works system, to-wit:

Conrad Brothers - -	$48,275.00
Conrad Townsite Company	$13,930.00
Pondera Valley State Bank	$5,419.00
W. G. Conrad - - - -	$850.00

(See Tr. pp. 54 and 55.)

By reference to the testimony of Ben Hager (Tr. p. 58), it will appear that the notes executed by Conrad City Water Company correspond with the amount of money advanced by the various persons and corporations and used in the construction of the water plant, as shown on Transcript, p. 54.

The board of directors of the Corporation passed the resolution to issue these notes to pay for the plant and to turn over $80,000.00 in bonds, secured by mortgage on the Company's property as security for the notes (Tr. pp. 54 and 55).

It thus appears that the Company acquired title to the property pursuant to Mr. Ben Hager's offer. Its resolution of acceptance, the issuance of the stock to Ben Hager and the execution and delivery of the notes directly to the persons and corporations who had furnished the money for the construction of this plant and the execution and delivery of the $80,000.00 in bonds secured by mortgage, are sufficient to show title as aforesaid. It thus appears that the notes were issued only for the amount of money which was act-

ually borrowed and used to construct this plant and Ben Hager never received any compensation for the franchise issued by the Town of Conrad, the rights of way for the pipe lines, the reservoir sites and water supply or the office building in the Town of Conrad, save and except the shares of stock of Conrad City Water Company. Nor did he receive any compensation for his personal services rendered or personal expenses incurred in constructing said plant, save and except by sale of said plant to Conrad City Water Company, a Montana corporation (Tr. p. 58).

It appears that these bonds so pledged were thereafter sold on November 12th, 1913 (Tr. p. 58) to satisfy the indebtedness of these notes, but were bought in by Mr. Paris B. Bartley as trustee for the holders of said notes. Hence it may be said that the bonds are still held as security for the notes.

A proper proceeding has been commenced to foreclose the mortgage securing these bonds, by Pondera Valley State Bank, the trustee named in the Indenture of Trust, dated August 26th, 1910, and recorded in the office of the Clerk and Recorder of Teton County, Montana, on December 14th, 1910, in book 4B of Mortgages, page 148 (Tr. p. 32). All persons in interest are parties to that suit and all equities between them can be adjusted and the rights of all can be fully determined in that foreclosure proceeding.

Appellant, Pacific Coast Pipe Company, had a certain promissory note signed "Conrad City Water Company, by Ben Hager, Manager," bearing date February 7th, 1911, for the payment of $8,748.55, with eight per

cent interest thereon and commenced an action *in personam* in the United States District Court for the District of Montana upon said note on October 16, 1913 (Tr. p. 3).

Appellant on November 8, 1913, caused the United States Marshal to file a copy of its writ of attachment and notice of attachment in the office of the Clerk and Recorder of Teton County, Montana, seeking thereby to attach certain real estate of Conrad City Water Company (Tr. p. 109).

On March 16, 1915, Conrad Mercantile Company commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, against the Conrad City Water Company, to foreclose a valid and subsisting mechanic's lien, said case being No. 1407 on the files of said Court (Tr. p. 28). Such proceedings were had and taken before said State Court in said cause No. 1407; that on March 16, 1915, an order was duly made and entered by said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, wherein and whereby Appellee James T. Stanford was duly appointed receiver of all and singular the real and personal property and assets of Conrad City Water Company (Tr. p. 37, Exhibit A). Appellee James T. Stanford duly qualified as such receiver and took immediate possession of all the property and assets of Conrad City Water Company, on March 16, 1915, and has since said date continued to act as such receiver, and to administer the affairs of said Water Company.

On June 23, 1915 after leave of Court first had and obtained, Appellee Pondera Valley State Bank, a corporation, as trustee duly commenced its certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, the same being case No. 1486 on the files of said Court, wherein Conrad City Water Company, Conrad Mercantile Company and Pacific Coast Pipe Company were named as defendants for the purpose of foreclosing that certain deed of trust securing the $80,000.00 issue of bonds. Conrad City Water Company duly appeared in said action, and on June 23, 1915, an order was duly given, rendered and made by said District Court in said cause whereby the appointment of the receiver of Conrad City Water Company made by said Court on March 16, 1915, in said cause No. 1407 was extended to said cause No. 1486, and James T. Stanford was designated and appointed as receiver of all the assets and property of said Water Company (Tr. p. 40, Exhibit B).

Thereafter on June 23, 1915, Appellee Pondera Valley State Bank after leave of Court first had and obtained, duly filed in the District Court of the Eighth Judicial District of the State of Montana, in said cause No. 1407, its complaint in intervention claiming a lien upon all the assets and property of said Water Company prior and superior to the lien of said Conrad Mercantile Company by virtue of said mortgage and deed of trust, and thereupon and thereafter such proceedings were had and taken in said cause No. 1407, that by an order duly given and made, the said appointment

of James T. Stanford as receiver of the property, assets and effects of said Water Company was extended to said cause No. 1486 (Tr. p. 46, Exhibit C).

In the face of this receivership in the State Court, Appellant brings this action in the Federal Court praying for a decree establishing priority of its attachment and judgment appointing a receiver and further relief (Tr. p. 16).

There is not a scintilla of evidence anywhere in the record to indicate any fraud or even a lack of good faith upon the part of Ben Hager, W. G. Conrad or any of the incorporators of Conrad City Water Company or upon the part of Conrad Brothers, Conrad Townsite Company or Pondera Valley State Bank in advancing funds for the construction of the water plant. Nor is it alleged that at the time of these transactions the Conrad City Water Company was indebted to the Complainant, now Appellant, in any sum whatever.

ARGUMENT.

Jurisdiction In State Court.

We deem it unnecessary to enter into a discussion with the learned counsel of the Appellant upon the question of the right of a State Court to enjoin, or in any way interfere with the process of the United States Court.

It is "a rule of general application that, where the property is in the ACTUAL POSSESSION of one

court of competent jurisdiction, such possession cannot be disturbed by process out of another court."

Morgan v. Sturges, 154, U. S. p. 247;
38 L. ed. on page 981;
14 Sup. Ct. Rep. on p. 1024.

From the foregoing it is apparent that the actual possession of either a State or Federal Court cannot be disturbed by process issued out of another court.

It appears from the pleadings and proof that on March 16, 1915, the State Court had by its receiver, James T. Stanford, taken actual physical possession of all the property of the Conrad City Water Company and at all times since has been and now is engaged in administering it through its said receiver, and unless the proceedings are void upon their face the United States Court would have no right to interfere with the jurisdiction or possession of the State Court.

The United States Court in which this suit is pending has not any of the property of Conrad City Water Company in its care, custody or possession and never had actual possession of any of the property of Conrad City Water Company.

Accordingly the Federal Court has not any jurisdiction sufficient to disturb the possession of the receiver appointed by the State Court.

There is no allegation of any levy of any execution or the taking possession of any of the Water Company's property by the Marshal or making any entry thereon. There is the bald allegation of an attachment, but sufficient facts are not stated to show the

issuance of a valid attachment or a valid levy thereunder. But if it were conceded that an attachment was duly and regularly issued and levied, that would not give the United States Court jurisdiction over the property. The Marshal has not taken possession of the real estate. He had no authority to do so under a writ of attachment. He could not take possession of the franchise. It is not pretended that he took possession of anything, but simply filed a copy of the pretended writ and notice in the office of the Clerk and Recorder of Teton County. Even if such proceedings constituted a valid attachment they would not give the Federal Court jurisdiction over, or custody of the property of Conrad City Water Company.

As was aptly said by the learned Judge of the trial Court: "Plaintiff's attachment of the Water Company's realty, by filing notice thereof with the recorder of the county of the realty's situs, created but a lien for security to pay the judgment."

See Rounds v. Foundry, 237 U. S. 308.

"It did not draw the realty into this Court's custody, and was no barrier to other liens and actual seizure by other courts. It is no more potent than a judgment lien, and even levy of execution upon land, without possession, does not bring the land in *custodia legis,* does not disable another court from subsequent receivership over it; and such receivership had, a sale upon such levy is void.

In re Hall v. Stilson Co.,73 Fed. 527 at 533; Drake on Attachments, 239-240.

"Hence said attachment did not disable the State Court to appoint and possess the property by a receiver. This Court is without jurisdiction."

There is no provision in the United States Statute defining the manner of issuing or serving or levying attachments. It is only by virtue of the power given by the State statute and whatever inherent power the Court may possess under the common law to issue an attachment, that a Federal Court may issue an attachment.

Rule 26 of the United States District Court for the District of Montana provides that "attachments shall be governed by the laws of the State of Montana." Now we turn to the statutes of Montana, and the decisions, to learn what is the effect of an attachment.

Section 6687 of the Revised Codes of Montana defines an attachment as a lien and prescribes when that lien shall take effect.

In the following Montana cases an attachment is held to be a lien.

Wilson v. Harris, 21 Mont. 374;
Montana National Bank v. Merchants National Bank, 19 Mont. 586;
Palmer v. McMasters, 10 Mont. 390;
Ryan v. Maxey, 14 Mont. 81;
Holter v. Ontario Co., 24 Mont. 184-193.

When a judgment is obtained in an action in which an attachment has been issued, the attachment lien merges in the judgment. Then the party only has a judgment lien.

The United States statute does not provide that a

judgment in the United States Court shall constitute a lien upon land.

Section 6812 of the Revised Codes of Montana provides that a judgment in the United States Court shall become a lien upon land when a transcript thereof is filed in the office of the Clerk of the Court of the County wherein the land is situated. There is no allegation in the complaint that there was a transcript of the judgment filed in the office of the Clerk of the Court of Teton County. In the absence of a transcript of the judgment being filed in the office of the Clerk of the Court of the County in which the land is situated, the property is not affected, and property is not affected by an execution until an actual levy is made.

Montana Revised Codes, Sec. 6821;
Wyman v. Jensen, 26 Mont. 237;
Holter Hardware Co., v. Ontario Co., 24 Mont. 193.

The most that Pacific Coast Pipe Company can claim is that it has a lien upon certain real property of Conrad City Water Company by virtue of the alleged notice of an attachment.

We do not concede that Appellant has any valid lien upon Appellee's land but even if we assume, momentarily, that such an attachment lien existed, the alleged lien does not give the Federal Court jurisdiction of the property or prevent proceedings in the State Court to forclose a lien by a mortgage or otherwise, or to sell the property under an execution issued out of a State court. It cannot be contended that an attachment lien is of any higher order than a judgment lien.

In fact, it is of a lesser degree because it is merged in the judgment lien and a lien of a higher order cannot be merged in one of lower order.

Can it be successfully contended that if a judgment were obtained in the United States Court and a transcript thereof filed and docketed in the office of the Clerk of the State Court of the County in which the land was situated, that such a proceeding would give the United States Court custody and possession of the property and effectually bar all proceedings in a State Court to foreclose a mechanic's lien, a mortgage upon the property, or any other action which would affect the title of the property, or the possession thereof or prevent the property from being sold under an execution issued out of a State Court upon a judgment duly made, given and entered in that Court against the owner of the property?

To ask this question is to answer it in the negative.

We believe a careful examination of the authorities demonstrates the rule to be that where property is actually TAKEN and HELD under process, it is in the custody of the law and within the exclusive jurisdiction of the Court from which the process has issued. That the possession of the officer cannot be disturbed by process from any other court; but in the case at bar, we maintain that there was no taking of any property of Conrad City Water Company into the possession of any Court until James T. Stanford was appointed receiver by the State Court.

Under the Montana practice and decisions, it is obvious that an attachment of real estate does not give

either the sheriff or the attaching creditor any right of possession of the attached realty.

As against all the world the real estate remains in the possession of the debtor until the period of redemption expires or until, in a proper case, such as the foreclosure of a mortgage or mechanic's lien, a receiver is appointed under the chancery power of the Court.

It cannot be disputed or denied that Conrad City Water Company was entitled to remain in possession and did in fact remain in possession of its real estate and all its other property until possession was surrendered to the receiver of the State Court on March 16, 1915.

If the contention of Appellant's counsel were correct, that the mere filing of an action at law in the Federal Court to recover a money judgment upon an alleged note and the issuance of a writ of attachment against the real estate of the debtor gave the Federal Court exclusive jurisdiction of the affairs and property of that debtor, such a rule would cast upon the Federal Court an unjust burden by requiring all future litigants to apply to that Court or remain without relief. In the case at bar, it would mean that Pondera Valley State Bank could not foreclose its mortgage upon the property of Conrad City Water Company because both are Montana corporations and neither would be entitled to sue the other in the Federal Court. Such a rule would deprive a mortgagee of his right to seek a foreclosure of any mortgage and the appointment of a receiver therein, in event of an attachment having

been issued from the Federal Court upon the mortgaged real estate of the debtor prior to the filing of the foreclosure action in the State Court. We maintain that no court has ever so held and in the logical course of events no court will ever so hold.

Obviously the fact that an action may be pending in the Federal Court against a Montana corporation to recover a money judgment and the further fact that a notice of attachment may have been filed against the real estate of that corporation cannot be held to impair or prevent any right of the mortgagee to seek foreclosure of his mortgage lien upon that real estate and obtain the appointment of a receiver in a proper case under the provisions of our Montana Code.

The Appointment of a Receiver In the State Court.

It is contended that it appears on the face of the pleadings that the State Court had no jurisdiction to appoint a receiver. If that be true, then it is not necessary to waste time prosecuting an action to remove that receiver. His appointment is "a mere scrap of paper" and the proper thing for Appellant to do is to simply disregard it and to go on and sell the property. But the appointment of the receiver is not void. The Court had jurisdiction of the parties and of the subject matter. The receiver is not appointed in an action at law. He was first appointed in an action to foreclose a mechanic's lien, an equitable action. And that a court of equity has power to appoint a receiver in such

Smith on Receivership, pages
Alderson on Receivers, Secti
Simonton vs. Kelly, 1 Mont.
Cook v. Gallatin R. R. Co.,
Montana Constitution Article
Stevenson v. Matteson, 15 Mc

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property during the pendency of the action. The Supreme Court held, and rightly too, that the Court in that action did not have jurisdiction to appoint a receiver and this because a Court of law does not possess that jurisdiction or power and for the further reason that the Plaintiff could have proceeded under his execution and sold the property, just as the Appellant in this case could have done.

If the levying of an attachment had given the Court jurisdiction of the property and the custody of it, the Court could have appointed a receiver to preserve and protect that property but the Court held and rightly too, that it did not have jurisdiction to do so. And yet the learned counsel for Appellant relies on that case and quotes from it, forgetting that it is against his theory that an attachment of property gives the Court jurisdiction of the property and that the Court becomes its custodian. The officer, in levying on real estate never takes it into his possession and never has possession of it to give the Court any possession or custody over the property.

Section 6698 of the Revised Codes of Montana, reads as follows:

"A receiver may be appointed by the Court in which an action is pending, or by the Judge thereof.

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In cases when a corporation has been dissolved, or is in insolvent, or in imminent danger of insolvency or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The complaint under which the receiver was appointed by the State Court is set out at length on

pages 62 to 80 of the Transcript and the Complaint in Intervention filed by Pondera Valley State Bank appears on pages 81 to 108 of the Transcript. The orders made and entered by the State Court appointing the receiver and extending this receivership to the foreclosure proceedings of Pondera Valley State Bank are set forth on pages 37 to 47 of the Transcript.

We respectfully submit that these pleadings conclusively demonstrate the necessity of a court of equity appointing a receiver for a quasi public corporation.

In this connection we beg leave to quote again from the decision of the learned Trial Judge: "The otherwise sufficiency of the complaint and the evidence before the State Court cannot be questioned here, but only in a court having power to review the State Court, which this Court has not.

> See Shields v. Coleman, 157, U. S. 178;
> McKinney v. Landon, 209 Fed. 303.

> "The appointment was valid, and since a suit against the receiver, without leave of the State Court is a trespass against said Court upon which no right can be founded, this Court will not entertain it."

> See Porter v. Sabin, 149 U. S. 480.

> "The receivership in the lien suit merged in that of the bond suit, and if the former suit is questionable in scope or jurisdiction, the latter is not, and the merger was without interregnum in the State Court's possession of the property in which the instant suit could attach. It is settled beyond controversy that for obvious reasons when property is

in *custodia legis,* the Court in possession is vested with optional exclusive jurisdiction to hear and determine all controversies affecting title, possession and control of the property. Unless it consents to exercise of like jurisdiction by other courts, they are without such jurisdiction."

Palmer v. Texas, 212 U. S. 128;
Murphy v. Co., 211 U. S. 569;
Wabash Ry. v. College, 208 U. S. 54, 611.

Conrad City Water Company is and was a quasi public corporation furnishing water for health and fire protection for a municipal corporation and its inhabitants, and we respectfully submit that a court of equity in the exercise of its jurisdiction is and was justified in appointing a receiver for this corporation under the allegations of the 10th, 11th, 12th, 13th and 14th paragraphs of the complaint of Conrad Mercantile Company. (See Tr. p. 72.)

We observe at page 23 of Appellant's brief that counsel for Appellant in his "complaint alleged and the answer admitted that the entire plant of the Company was a unit and that to sever the real estate from the personalty would be injurious to the property."

The materials furnished by Conrad Mercantile Company for which it claimed a lien under the Revised Codes of the State of Montana were furnished for the entire plant of Conrad City Water Company as a unit, and were obviously used upon various structures, improvements, pipe line and service pipes scattered over various parts or portions of the miles of pipe line and water supply system and equipment of Conrad City

Water Company, which Appellant concedes constitute a single unit. We maintain that Section 7295 Revised Codes of Montana can have no application to the lien of Conrad Mercantile Company, since this lien extended to the entire plant of the Water Company as a single unit, all of which plant was also subject to the mortgage lien of Pondera Valley State Bank as trustee. The removal of any part of this plant would impair the unit. Obviously, then, this section can apply only to cases where there is some "prior lien, encumbrance, or mortgage upon the LAND upon which buildings, structures and improvements are erected," since it permits the lien claimant to remove the particular building, structure or improvement to which his lien attaches. In the case at bar, Conrad Mercantile Company had a lien upon the entire water plant, which appellant claims is simply a single unit, and a separation of any part from the whole would manifestly impair the plant as a working unit and deprive the inhabitants of Conrad of water for health and fire protection. Moreover, it is apparent that the plant and property upon which this lien existed was at the time of the appointment of the receiver in danger of being lost or materially injured or destroyed, unless the receiver were appointed.

We respectfully submit that even a slight examination of the pleadings in this receivership proceeding will conclusively demonstrate that the interests of the public at large and particularly the health, property, and even the lives of the community dependent for water and fire protection upon the service of Conrad

City Water Company were involved in these receivership proceedings, and the State Court in the exercise of its general equity power would have been derelict in its duty had it refused the appointment of the receiver.

In fact the Appellant's counsel in his complaint makes an allegation which is sufficient to sustain the appointment of the receiver in this case about which it complains.

In paragraph 10 of the Bill of Complaint it is alleged that after the complainant recovered its judgment "the officers of the Conrad City Water Company abandoned their functions and turned the affairs of the Company over to the management of the officers in charge of the several corporations hereinabove referred to" (Tr. p. 11). If there ever was a case in which a receiver should be appointed it is one in which the officers of a corporation abandon their functions and abandon the property. In such case, it is the time for a court of equity to step in and appoint a receiver to take charge of and preserve the property.

It would appear from the brief of the learned counsel that the ground which he urges is the want of jurisdiction of the Court to appoint a receiver and that the United States Court had jurisdiction of the property. As we have heretofore shown, that view is erroneous. The appointment of a receiver cannot be attacked collaterally.

> High on Receivers, 4th Ed. Sec. 39, A. Note 98.

From the foregoing we respectfully maintain that the decree appealed from should be affirmed.

Respectfully submitted,

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